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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CHRISTINE RAMIREZ PEET, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, PIMA COUNTY, Respondent Employer, PIMA COUNTY c/o PINNACLE RISK MANAGEMENT SERVICES, Respondent Insurer.	2 CA-IC 2009-0014 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION – INDUSTRIAL COMMISSION

ICA Claim No. 20030-580144

Insurer No. 20030150C0

LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

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The Industrial Commission of Arizona
By Andrew F. Wade — Phoenix
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By Pamela Treadwell-Rubin and — Attorneys for Respondents
Elizabeth L. Warner — Employer and Insurer

E S P I N O S A, Presiding Judge.

¶1 In this statutory special action, petitioner/employee Christine Peet challenges the award of the administrative law judge (ALJ) determining she was not entitled to temporary workers' compensation benefits. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 "We view the evidence in the light most favorable to sustaining an ALJ's award." *Sw. Gas Corp. v. Indus. Comm'n of Ariz.*, 200 Ariz. 292, ¶ 2, 25 P.3d 1164, 1166 (App. 2001). While employed by Pima County, Peet injured her lower back in a work-related accident in February 2003. She subsequently injured her right shoulder in a fall that was determined to have been related to her lower-back injury. She received treatment for both injuries and, following an independent medical exam (IME) in March 2005, the respondent insurance carrier closed her claim with no permanent impairment and no need for further medical care. Peet protested the closure, and in

December 2005, after conducting hearings, ALJ Israel determined that Peet's claim should remain open for additional treatment.

¶3 A year later, in December 2006, Peet filed a request for investigation with the Industrial Commission of Arizona (ICA) pursuant to A.R.S. § 23-1061(J).[1] In her request, Peet stated, "Carrier is refusing to pay for medical treatment despite claim still being open. Carrier has not paid any temporary benefits." The carrier thereafter sent Peet a check for $3,366 and, in its response to the ICA concerning Peet's § 23-1061(J) request, explained that these funds represented temporary compensation for the period from June 3, 2005 through August 5, 2005, and that it believed no additional compensation was owed. The ICA set the issue for a hearing before an ALJ.

¶4 Prior to the scheduled hearing, the carrier issued another closure notice on February 6, 2007, to which Peet filed a protest. On February 12, 2007, Peet wrote to ALJ Tyson and asked that "the closure issue" be substituted for the issues raised in her § 23-1061(J) request because Peet was withdrawing that request. In her letter, she described the § 23-1061(J) request as "resolved." In a "Notice of Cancellation and Award," ALJ Tyson complied with Peet's request, specifically noting that the § 23-1061(J) request had been withdrawn and that "no further action" would be taken on it. Following hearings on Peet's closure protest, ALJ Tyson issued a decision in

[1]This statute provides that the ICA "shall investigate and review any claim in which it appears . . . that the claimant has not been granted the benefits to which such claimant is entitled" and hold a hearing if it "determines that payment or denial of compensation is improper in any way."

May 2007, closing Peet's back injury as of March 6, 2007, and her shoulder injury as of March 23, 2007.

¶5 Over eighteen months later, Peet filed another request with the ICA under § 23-1061(J), claiming the carrier still owed her temporary compensation for the period between March 2005 and March 2007. In her new request, Peet stated, "Defendants have taken the position that [she] is not entitled to temporary benefits between 3/1/05-3/27/07[2] minus benefits paid for 6/3/05-8/5/05."[3] This request was filed approximately two years after her previous request on this topic.

¶6 After conducting a hearing, ALJ Haley determined that, for the period between March 1, 2005 and May 9, 2006, Peet was only capable of full-time, sedentary work and thus "may have had some loss of earning capacity," but also found Peet could not recover for any such loss because her request was outside the two-year statute of limitations provided by § 23-1061(J). For the period between May 9, 2006 and March 23, 2007, ALJ Haley determined that Peet had been able to return to full-time work, which meant no temporary compensation was owed for that period. In reaching the latter conclusion, ALJ Haley partially relied on portions of an IME conducted in May 2006.

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[2]In her opening brief, Peet states that the date "3/27/07" should have been "3/23/07" pursuant to ALJ Tyson's May 2007 decision.

[3]Peet also alleged the carrier had not paid an outstanding doctor bill. The carrier asserts on appeal, and Peet does not dispute, that this issue has been resolved.

¶7 In response, Peet filed a Request for Review in which she argued that the two-year statute of limitations did not apply to her claim and that ALJ Haley had improperly relied on the 2006 IME when determining Peet was not entitled to temporary compensation from May 2006 through March 2007. In her Decision upon Review, ALJ Haley rejected both of Peet's arguments. First, she explained that, if the two-year statute of limitations in § 23-1061(J) did not apply to Peet's claim, then Haley "adopt[ed] the [carrier]'s res judicata argument" to preclude liability for additional compensation from March 2005 through May 2006. ALJ Haley also rejected Peet's contention that the ALJ could not rely on the 2006 IME, which Haley "found to be most probably correct, well founded, and . . . consistent with the law of the case." Peet subsequently filed this petition for special action. We have jurisdiction pursuant to A.R.S. §§ 23-943(H), 23-951, and Rule 10, Ariz. R. P. Spec. Actions.

Discussion

¶8 Peet first argues ALJ Haley improperly determined she was not entitled to temporary benefits for the period between May 9, 2006 and March 23, 2007. We will affirm an ALJ's decision if it is based upon any reasonable interpretation of the evidence, but we review de novo all questions of law. *Meiners v. Indus. Comm'n of Ariz.*, 213 Ariz. 536, ¶ 7, 145 P.3d 633, 635 (App. 2006). Second, she contends ALJ Haley erred when she determined Peet's entitlement to temporary benefits for the period between March 1, 2005 and May 9, 2006 was barred by res judicata. Because "the applicability of preclusion is a mixed question of fact and law," we apply a deferential standard of review

"to resolutions of disputed facts when supported by reasonable evidence" and an "independent judgment" standard of review to "the ultimate conclusion that these facts do or do not trigger preclusion." *A.J. Bayless v. Indus. Comm'n of Ariz.*, 179 Ariz. 434, 439, 880 P.2d 654, 659 (App. 1993).[4]

May 2006 through March 2007

¶9 Peet first claims ALJ Haley's decision was not based on substantial evidence because, in determining that Peet was not entitled to temporary compensation from May 2006 through March 2007, the ALJ improperly relied on opinions contained in the 2006 IME. She argues ALJ Haley could not rely on these opinions because they conflicted with ALJ Israel's 2005 decision. In response, the carrier contends ALJ Haley properly relied on the 2006 IME because it did not contradict previous ALJ decisions but rather addressed new issues that had arisen after the 2005 decision.

¶10 We agree with the carrier that Peet has failed to demonstrate that ALJ Haley improperly relied on portions of the 2006 IME in determining Peet was not entitled to temporary compensation. ALJ Haley's determination that Peet's medical restrictions would not prevent her from returning to full-time work as of May 2006 was not only based on portions of the 2006 IME, but also on reports from the physician treating Peet for her shoulder, Dr. Susini, who similarly had released her to return to work with no restrictions during the same time period. Significantly, ALJ Israel had adopted Susini's

[4]Because neither the ALJ nor the parties have raised whether res judicata would also preclude the receipt of temporary compensation for the period from May 2006 through March 2007, we will not address that issue.

earlier opinion in the 2005 decision. Thus, ALJ Haley's reliance on Susini's later opinion, as well as on similar opinions contained in the 2006 IME, was reasonable and not inconsistent with ALJ Israel's decision.

¶11 Moreover, as the carrier correctly points out, many of the opinions in a subsequent 2007 IME (which included opinions from the same three physicians as the 2006 IME) were based in large part on medical opinions contained in the 2006 IME, and the 2007 IME was partially adopted by ALJ Tyson when closing Peet's claim in May 2007. Accordingly, because substantial evidence supported ALJ Haley's decision and Peet has failed to show otherwise, we affirm the award on this basis. *See Meiners*, 213 Ariz. 536, ¶ 7, 145 P.3d at 635 (appellate court will affirm ALJ's decision if based upon any reasonable interpretation of evidence).[5]

March 2005 through May 2006

¶12 Peet next contends ALJ Haley abused her discretion when she determined that res judicata precluded Peet's obtaining temporary benefits for the period between March 1, 2005 and May 9, 2006. Because of ambiguity in the use of the term "res judicata," Arizona courts have adopted the terms "claim preclusion" and "issue preclusion" instead. *See Circle K Corp. v. Indus. Comm'n of Ariz.*, 179 Ariz. 422, 425-26, 880 P.2d 642, 645-46 (App. 1993). "'Claim preclusion' occurs when a party has

[5]Peet also argues that ALJ Haley's reliance on the 2006 IME was erroneous because it was not a basis for the parties' earlier settlement agreement regarding loss of earning capacity and entitlement to supportive care. However, because Peet failed to raise this argument before the ALJ, it is waived. *See Kessen v. Stewart*, 195 Ariz. 488, ¶ 19, 990 P.2d 689, 694 (App. 1999).

brought an action and a final, valid judgment is entered after adjudication or default. The party is foreclosed from further litigation on the claim only when the policies justifying preclusion are furthered." *Id.* at 425, 880 P.2d at 645. "'Issue preclusion' occurs when the issue to be litigated was actually litigated in a prior proceeding." *Id.* Issue preclusion requires actual litigation, while claim preclusion does not. *Id.* Issue preclusion does not apply here because the issue of temporary compensation was not litigated. *See id.* at 427, 880 P.2d at 647. In determining whether claim preclusion should apply, courts consider whether the party had an incentive to litigate and whether applying the doctrine of preclusion would otherwise be unfair. *See id.* at 426-27, 880 P.2d at 646-47.

¶13 Peet argues claim preclusion does not apply because her 2006 request was "extremely broad" and concerned the lack of "any" payment, while her 2008 request was "specific to the period of time for which [she] was entitled to benefits." She further claims she had properly withdrawn her 2006 request because her receipt of a check from the carrier, even though for a lesser time period than she believed she was owed and clearly designated as a final payment, "rendered [her request] inaccurate" because "her assertion that the insurance carrier had not paid 'any' benefits was now no longer true." Finally, she claims res judicata does not apply because she did not "bring an action" but instead "used the statute available to her to request an investigation into unpaid benefits" and "did not file a request for hearing."

¶14 Relying on *Circle K Corp.*, the carrier responds that, because "Peet had an opportunity to litigate the issue of temporary compensation between March 1, 2005 and

March 27, 2007," and failed to do so, "she should now be foreclosed from attempting to re-determine the same issues, where there has been no change in the evidence available." In addition, the carrier points out that Peet's assertion to the ALJ in 2007 that she was withdrawing her 2006 request because it was "resolved" undercuts her current argument that she withdrew it because the interim receipt of a check made the request "inaccurate," especially when Peet waited two months after receiving the check to withdraw her request. The carrier also argues that applying res judicata is appropriate because the ALJ accepted Peet's withdrawal of her claim in a February 2007 Notice of Cancellation and Award, which decision subsequently became final.

¶15 We agree with the carrier that Peet has failed to demonstrate that the application of res judicata in these circumstances was improper. As the undisputed record demonstrates, Peet withdrew her 2006 request, informing the ALJ the issue had been "resolved." At the time of her withdrawal, Peet had received only three months' temporary compensation as well as notice from the carrier that no additional payments would be forthcoming. ALJ Tyson subsequently entered an order substituting the 2006 request for another issue. Thus, although Peet had an incentive to litigate the issue at that time, she instead informed ALJ Tyson that the issue was "resolved." Accordingly, ALJ Haley correctly determined Peet was precluded from later bringing a similar request seeking additional temporary compensation. *See Circle K Corp.*, 179 Ariz. at 426, 880 P.2d at 646 (explaining preclusion promotes "finality in litigation" and "efficiency in the use of the courts" and "assists the effective administration of the compensation system");

cf. Gerhardt v. Indus. Comm'n of Ariz., 181 Ariz. 215, 218, 889 P.2d 8, 11 (App. 1994) (holding uncontested notice of claim status had preclusive effect on issues known at time of notice, including recovery of lost wages).

¶16 Peet's argument that claim preclusion should not apply because her 2006 request was not a "claim" but instead a request for an investigation is also not well taken. As the carrier points out, because Peet was paid for only three months of the period for which she believed she was entitled to benefits, "it is axiomatic that she would have an incentive to pursue the matter through the hearing process"; "[b]ecause the request for investigation was not resolvable at the Claims level, it required a referral to Hearing, which is exactly what occurred." *See Sw. Gas Corp.*, 200 Ariz. 292, ¶ 7, 25 P.3d at 1167 (stating § 23-1061(J) requires hearing when entitlement to benefits disputed). Moreover, the form Peet submitted was entitled "Request for Hearing" and "requested that a time and place be fixed for hearing." Finally, it is undisputed that, in response to Peet's 2006 request, the carrier sent her a check for the amount it believed was owed, and the ICA subsequently set the matter for a hearing, which hearing Peet cancelled because the matter was "resolved." Accordingly, Peet has failed to demonstrate ALJ Haley improperly determined that her claim for temporary benefits was foreclosed by claim preclusion, and we affirm the award on this basis as well.[6]

[6]We also reject Peet's contention that ALJ Haley previously had implicitly rejected the carrier's res judicata argument by allowing the hearing on the merits of her claim to proceed after receiving the parties' briefs on the res judicata issue. The record demonstrates that the ALJ informed the parties there would be no ruling on the statute of limitations and res judicata issues until her final decision. We likewise reject Peet's

Disposition

¶17 For the reasons stated above, the ALJ's award is affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

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argument that the award should be vacated as unreviewable, because although the decision on this issue is brief, we are nevertheless able to reach the merits under these circumstances. *Cf. Post v. Indus. Comm'n of Ariz.*, 160 Ariz. 4, 7, 770 P.2d 308, 311 (1989) (finding judicial review impossible based on ALJ's failure to make findings on material issues; "we have no way of evaluating the basis of the judge's award and consequently cannot determine the factual support for, or the legal propriety of, his conclusion").